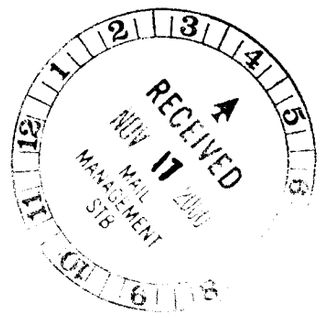
200451

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

Notice of Proposed Rulemaking



JOINT COMMENTS OF CERTAIN COAL SHIPPERS

Otter Tail Power Company ("OTP"), Public Service Company of Colorado ("PSCo"), Southwestern Public Service Company ("SPS"), TUCO INC. ("TUCO"), Tucson Electric Power Company ("TEP"), and Western Resources, Inc. ("Western") (referred collectively herein as "Joint Commenters"), hereby jointly submit the following comments in response to the Board's Notice of Proposed Rulemaking ("NOPR") issued in this proceeding on October 3, 2000. Joint Commenters are all Parties of Record in this proceeding and submitted comments jointly in the Advanced Notice of Proposed Rulemaking ("ANPR") stage of this proceeding. As set out in more detail in these comments, Joint Commenters continue to strongly urge the Board to clearly revise its rules with the goal of adopting regulatory changes that will facilitate improved service in the railroad industry by enhancing meaningful competition between the major Class I railroads and in the rail industry generally.

I.

INTRODUCTION AND SUMMARY OF COMMENTS

The Board's present review of its merger rules was prompted by the potential merger of The Burlington Northern & Santa Fe Railway Company ("BNSF") and the Canadian National Railway Company ("CN") and the specter that this merger would trigger the consolidation of the railroad industry into just two North American railroads. This review was also prompted by the Board's recognition that recent major rail mergers have not resulted in the efficiencies and improved service touted by the merger applicants in their merger proceedings, and that rail shippers had not yet fully recovered from such service disruptions.[1] The oral and written testimony of hundreds of rail shippers in Ex Parte No. 582, Public Views on Major Rail Consolidations, and the many participants in the ANPR stage of this proceeding confirmed the Board's concerns, and also documented in great detail how the deterioration of rail service is directly tied to and rooted in the diminishment of competition between the major Class I railroads and in the industry as a whole as the rail industry has become consolidated. This cause and effect relationship between the deterioration of service and the lack of meaningful competition between the Class I railroads and in the rail industry is particularly evident in the coal transportation segment of the railroad industry, and more particularly in the transportation of coal from western coal mines to electric generating plants in the western and mid-western United States.

At the conclusion of its hearings in Ex Parte No. 582, the Board rightfully concluded that "our current rules are simply not appropriate for addressing the broad concerns associated with reviewing business deals geared to produce two transcontinental railroads." Ex Parte No. 582,

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[1] *See, e.g.* Finance Docket No 33842, Decision Nos. 1 and 1A (STB served December 28, 1999) at 6-7, 65 Fed. Reg. 318 (Jan. 4, 2000).

Decision served March 17, 2000 at 2. These broad concerns included both service and competitive issues. *Id.* at 6. In the ANPR, the Board responded to the volumes of testimony in Ex Parte 582 No. by concluding that the "time has come" for it to consider whether it should revise its rail merger policy with an eye toward "enhancing, rather than simply preserving, competition." *ANPR* at 7. Common dictionary definitions of "enhance" include to "make greater," "heighten," "improve," "augment," and "intensify." In the ANPR the Board clearly stated that in considering a policy change to enhancing, not just preserving competition, it was referring to "means by which rail mergers could be used to promote and enhance competition in the rail industry." *Id.* (emphasis added). Moreover, the Board gave specific examples of rail competition-enhancing measures the Board believed had been implemented in prior mergers as well as new measures suggested by parties in Ex Parte No. 582. *Id.* Joint Commenters and many other parties filed comments in response to the ANPR that suggested various means by which the Board's regulations could be revised so as to improve and intensify rail competition as a result of future rail mergers.

Like Vice-Chairman Burkes, however, Joint Commenters "question whether or not the proposed changes [in the NOPR] adequately place the focus on the enhancement of intramodal, or rail-to-rail competition because this is generally what is lost in rail mergers." NOPR at 40. Indeed, as set out in more detail in these Comments, Joint Commenters maintain it is far from clear in the NOPR that the concept of "enhancing competition" it espouses is consistent with this concept as raised by the Board in the ANPR. Specifically, it is not clear that the NOPR truly articulates a "paradigm shift" (NOPR at 10) from the present policy of trying to preserve pre-merger intramodal competition to a policy of requiring rail mergers to not only preserve such competition, but result in improved, augmented, or intensified competition between Class I

railroads and in the railroad industry generally. As stated in more detail hereinbelow, Joint Commenters request the Board to revise the NOPR to clarify, consistent with the ANPR and the volumes of comments of shippers that both preceded and resulted from it, that the rail merger policy is being changed to require rail mergers to not only preserve levels of rail-to-rail competition existing prior to the merger, but also to generally enhance, improve, intensify, etc. the level of competition between Class I railroads and the railroad industry generally.

In addition, the NOPR adopts none of the suggestions of Joint Commenters and other participants on the ANPR phase of this proceeding of specific changes that could be made to the Board's rules that would facilitate the enhancement of competition in the railroad industry. In these Comments Joint Commenters propose several specific amendments to the NOPR intended to accomplish this result.

Finally, while the proposed rules incorporate certain measures designed to improve rail service after a major rail merger, the NOPR is lacking in specific means by which shippers may seek relief in the event the service levels predicted by merger applicants are not met. The NOPR should be revised to provide a clearer means by which merger applicants can be held accountable for service degradation after their merger.

II.

IDENTITY OF JOINT COMMENTERS

Joint Commenters ship, in aggregate, over 34 million tons of coal annually from mines in the western United States to coal-fired electric generating stations located in the western and midwestern states. In aggregate, OTP, PSCo, SPS, TEP and Western supply electricity to millions of retail electric consumers in the western and mid-western United States, and engage in wholesale sales of electricity over the Nation's transmission grid. Each utility Joint Commenter

has been directly affected by the efforts of the Federal Energy Regulatory Commission and various state agencies to restructure the electric utility industry by introducing more competition on the wholesale and retail levels. A brief description of each Joint Commenter follows:

Otter Tail Power Company is an investor owned utility headquartered in Fergus Falls, Minnesota. OTP provides electricity to over 126,000 customers in the states of Minnesota, South Dakota, and North Dakota. OTP is the operating partner in the Big Stone Plant and the Coyote Station, two coal-fired steam generation plants, and is the sole owner of Hoot Lake Plant, also a coal-fired plant. These plants burn approximately five million tons of coal per year from mines in the Western United States, and are heavily reliant upon railroads for delivery of this coal to the plants.

Public Service Company of Colorado is an investor owned utility headquartered in Denver, Colorado, and an operating division of Xcel Energy Services. PSCo provides electricity, natural gas, and other services to over 1.4 million customers in the State of Colorado. PSCo owns and operates five coal-fired generating stations in Colorado, which burn approximately eight million tons of coal annually, all of which must be shipped by rail over the lines of the BNSF and/or UP. Each of PSCo's coal-fired plants is presently served by only the BNSF or the UP for some or all of the routing from the mines to the plant.

Southwestern Public Service Company is an investor owned utility headquartered in Amarillo, Texas, and an operating division of Xcel Energy Services. SPS provides electricity, natural gas, and other services to approximately 400,000 customers in Kansas, New Mexico, Oklahoma and Texas. SPS owns and operates the Tolk and Harrington Generating Stations, located in Muleshoe and Amarillo, Texas, respectively. These plants burn around nine million tons of coal

each year that is presently delivered by the BNSF from mines in the Powder River Basin of Wyoming. While SPS's Harrington station enjoys some degree of rail competition due to a condition placed on the merger of the Burlington Northern Railroad Company and the Atchison, Topeka & Santa Fe Railway Company, the Tolk Station is captive to BNSF at destination.

TUCO INC. is headquartered in Amarillo, Texas, and is a wholly owned subsidiary of TUCO Holdings, Inc., which is owned by NexGen Resources Corporation and Republic Financial Corporation. TUCO is the coal provider of SPS responsible for the procurement of coal and rail transportation for SPS's Tolk and Harrington Generating Stations. TUCO purchases, and administers the contracts covering the shipment of, nearly nine million tons of coal to Tolk and Harrington annually on the lines of the BNSF.

Tucson Electric Power Company is an investor-owned electric utility headquartered in Tucson, Arizona. TEP's retail service area encompasses 1,155 square miles in Southeastern Arizona with a population of approximately 840,000. TEP also provides electricity to numerous wholesale industrial customers as well as offering electricity for sale to other utilities.

TEP owns and operates two coal fired generating stations that receive coal by rail: the Irvington Generating Station located in Tucson, Arizona and the Springerville Generating Station located in Springerville, Arizona. The Irvington and Springerville Stations together burn approximately 3.5 million tons of coal per year. The Irvington station currently burns coal from a mine near Gallup, New Mexico obtained under a long-term coal supply contract. This coal is delivered to Irvington pursuant to a rail transportation contract between TEP, the BNSF and the UP. The Irvington Station also burns some coal from Colorado mines. The Irvington Station is captive to UP at destination. The Springerville station burns coal obtained from the Lee Ranch

Mine near Baca, New Mexico under a long term coal supply contract. This coal moves in BNSF single line service to Springerville. The Springerville station is captive to BNSF at both origin and destination.

Western Resources, Inc. is a consumer services company headquartered in Topeka, Kansas with interests in monitored security and energy. Western's utilities, KPL and KGE, provide electric service to approximately 620,000 customers in Kansas. Western owns several coal-fired electric generating stations that in total burn approximately 11 million tons of coal each year that must be delivered by the BNSF and UP. Western's Jeffrey Energy Center, in St. Mary's, Kansas northwest of Topeka, requires approximately nine million tons of coal each year to provide electricity to satisfy the needs of Western's wholesale and retail customers. This coal is delivered by UP and BNSF in a joint line contract movement from mines in the Powder River Basin in Wyoming. JEC's transportation is captive to BNSF at origin, and captive to UP at destination. Western's Lawrence and Tecumseh Energy Centers, located on the line of BNSF between Topeka and Kansas City, each presently burn around one million tons of coal per year. Coal can be delivered to these plants from mines in Colorado via UP/BNSF joint line service. Coal from mines in the Powder River Basin can be delivered to the plants in single line BNSF service. These facilities are captive to BNSF at destination.

III.

COMMENTS

A. The Final Rules Must Clearly Define "Enhancement of Competition" as Expressly Requiring the Improvement of Rail-to-Rail Competition as Result of Rail Mergers

The comments and testimony submitted in Ex Parte No. 582 provided the Board with many "real world" examples of the reality that competition and service levels have generally

decreased as the railroad industry has become more consolidated. The Joint Commenters maintain this is irrefutable evidence that the overall standard applied by the Interstate Commerce Commission and the Board in prior rail mergers - attempting to preserve competitive levels existing prior to the merger – has been insufficient. The Joint Commenters therefore wholeheartedly agreed with the Board that "the time has come for us to consider whether we should revise our rail merger policy, as many have suggested, with an eye toward affirmatively enhancing, rather than simply preserving, competition." *ANPR* at 7. (emphasis added). In the ANPR, the Board expressly recognized that the parties in Ex Parte No. 582 were concerned with intramodal competition and that they therefore had proposed various "means by which rail mergers could be used to promote and enhance competition in the rail industry." *Id.* (emphasis added). The ANPR included a listing of such suggestions, including (1) maintaining open gateways; (2) requiring switching in terminal areas; (3) requiring merger applicants to provide contracts over non-bottleneck segments of rail movements; (4) requiring bottleneck rates in all cases where a shipper had entered into a contract for the non-bottleneck segment of the movement; and (5) revising or eliminating application of the "one lump" theory in rail mergers. *Id.* The ANPR sought comments on these and other measures for possible incorporation into the Board's merger rules.

Joint Commenters filed comments in response to the ANPR that asked the Board to adopt changes to its rules that would enhance rail-to-rail competition. Numerous other parties made similar suggestions with varying degrees of specificity. The NOPR, however, has changed the nature of the competition that would be enhanced as a result of a proposed rail merger from rail-to-rail competition to a much broader and unclear policy concept. Indeed, nowhere in the NOPR does the Board expressly state that its merger policy will henceforth be to require rail mergers to

result in the improvement or increased intensity of rail-to-rail competition, rather than merely preservation of pre-merger competition levels. Instead, the General Policy Statement in proposed 1180.1 speaks in broad terms of enhancing "the capabilities and the competitiveness of [a] transportation infrastructure" made up of railroads, "the nations highways, waterways, ports, and airports." (emphasis added). The notion of enhancing competition in the overall "transportation infrastructure" rather than just the railroad industry is found nowhere in the ANPR. Indeed, proposed section 1180.1 would permit the reduction of railroad transportation alternatives available to shippers after a rail merger if there are "substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved." Under this proposed section, such public benefits could include "enhanced competition." Given that the term "enhanced competition" is introduced in the NOPR in terms of the entire "transportation infrastructure," not intramodal competition specifically, the General Policy Statement can be read to create a policy in which rail-to-rail competitive options existing prior to a rail merger can be reduced if the applicants are able to show "enhanced competition" in the overall "transportation infrastructure."

This departure from the ANPR's proposed policy of enhancing intramodal competition after a rail merger rather than preserving pre-merger, rail-to-rail competition is also evident from the Board's discussion accompanying proposed section 1180.1(c). This provision would require merger applications to include "provisions for enhanced competition," but the Board's comments accompanying this proposed rule state that "[t]his new competition need not be directed to remedying specific competitive or other harms that are threatened by the merger. Competition can be enhanced in many ways and we do not want to limit the approaches that could be proposed to enhance competition here." *NOPR* at 13 (emphasis added). Such language

clearly does not require merger applicants to include provisions in their merger plan that will result in improved intramodal competition post-merger, and indeed it could be interpreted in light of the General Policy Statement to require applicants to show only that the merger results in improved competition somewhere within the "broader transportation infrastructure," such as a port or a highway system.

Moreover, the NOPR does not appear to change the current merger policy toward remedying competitive harm to specific shippers. Under the current policy the Board strives to preserve whatever level of competition the Board determines exists at a specific location prior to the merger. Similarly, in proposed 1180.1(c)(2), merger applicants are directed to "propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive options . . ." *NOPR* at 14 (emphasis added). This again is not a requirement that applicants demonstrate that intramodal competition after a rail merger will be enhanced, augmented or intensified. Indeed, proposed section 1180.1(c)(2)(iv) appears to give merger applicants an out from even the existing policy of preserving pre-merger competition by allowing the applicants to "offset harms that would otherwise not be mitigated," *e.g.*, the loss of an intramodal alternative, by demonstrating that the transaction and the conditions proposed by applicants will "enhance competition." As with the prior examples, this language can be interpreted to permit the reduction of rail-to-rail competition if the applicants could demonstrate that competition somewhere else in the "broader transportation infrastructure" has been "enhanced."

This theme is continued in proposed 1180.1(d), Conditions, which states that the Board "will condition the approval of Class I combinations to mitigate or offset harm to the public interest, and will carefully consider conditions proposed by the applicants in this regard." *NOPR*

at 16. (emphasis added). Under this proposed rule, applicants would only be required to propose conditions that "enhance competition" in the event public harms cannot be mitigated. This language on its face is contrary to a policy that rail mergers must result in enhanced competition, since under this rule a rail merger could be approved if applicants could demonstrate they had merely preserved pre-merger intramodal competition. And even to the extent that the requirement to "enhance competition" would apply, it is unclear whether the enhancement of competition requirement would apply to a specific shipper who would suffer competitive harm as a result of the merger, the railroad industry in general, or the "broader transportation infrastructure."

In summary, the NOPR has changed the potential policy shift raised by the Board in the ANPR from a policy of requiring mergers to result in enhanced intramodal competition to something else that is difficult to define. The NOPR should be revised to reflect (1) the comments of hundreds of parties in their testimony in Ex Parte No. 582, (2) the Board's own characterization in the ANPR of "enhancing competition" to mean enhancing, competition in the rail industry; and (3) the suggestions made by Joint Commenters and many others in response to the ANPR of means to utilize the rail merger application review process enhance intramodal competition, thereby improving the industry as a whole. As Joint Commenters stated in their Initial Comments on the ANPR, future railroad mergers should not result in any reduction of railroad options to any shipper, and the merger policy should so state. Joint Commenters have proposed specific revisions to the NOPR intended to achieve this result.

B. The Board Must Review and Change Regulations Other Than Those Promulgated Specifically for Rail Mergers

The Board notes in the NOPR that it received suggestions in the ANPR phase of this

proceeding that any changes to the rules governing rail mergers should be applied to the rail industry as a whole. NOPR at 10. Joint Commenters and others argued that such application was required because a policy of improving competition in the railroad industry cannot be realized if pro-competitive regulations are adopted in the limited context of rail mergers and consolidations. They argued further that changing the rules only in the context of mergers would result in an unbalanced rail industry, where the merged railroad would be required to provide access, rates and service its competitors do not have to provide under the Board's current regulations and decisional rules. Examples of such imbalance included (1) Part 1144, Intramodal Rail Competition; (2) Part 1146, Expedited Relief for Service Emergencies; (3) Part 1147, Temporary Relief Under 49 U.S.C. 10705 and 11102 for Service Inadequacies; and (4) the Board's so-called "Bottleneck Rules."[2] Joint Commenters and others suggested that a broad review of all the Board's rules related to rates and service therefore must be conducted for the purpose of establishing whether the rules will facilitate improved rail service and meaningful competition as the railroad industry continues to consolidate.

The NOPR neither addresses the comments on this issue received in response to the ANPR nor provides any explanation of the Board's rejection of the merits of the argument by Joint Commenters and others that a policy change – or "paradigm shift" in the words of the Board – to improve competition and service in the railroad industry can only be accomplished by applying any changes to the rules to non-merging as well as merging railroads. Joint Commenters submit that the Board should reconsider its decision to limit any changes to its

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[2] The term "Bottleneck Rules" refers to the rules adopted by the Board in *Central Power & Light Co. v. Southern Pac. Transp. Co.*, Nos. 41242, et al. (Dec. 31, 1996), clarified (Apr. 30, 1997), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999), *reh'g denied* (Apr. 20, 1999), *cert. denied sub nom. Western Coal Traffic League v. STB*, 120 S. Ct. 372 (1999); *Union Pac. R.R. v. STB*, No. 98-1058 (D.C. Cir. Feb. 15, 2000) ("Bottleneck Decisions").

regulations regarding rail-to-rail competition and service to the narrow rail merger context. In the alternative, the Board should provide a detailed explanation of why it believes limiting changes to existing rules regarding competition in the railroad industry to the rail merger context will not in fact retard the advancement of a policy of enhancing competition and improving service in the railroad industry by creating an uneven playing field, thereby discouraging rail mergers in the first place.

C. Specific Regulatory Changes That Should be Included in the Final Rules

The proposed rules issued by the Board in the NOPR do not include any of the concepts advanced by the Joint Commenters in the ANPR stage of this proceeding, nor do they include any of the specific regulatory language proposed by other rail shippers. However, Joint Commenters are encouraged by the separate comments submitted by Vice Chairman Burkes and Commissioner Clyburn that characterize the NOPR as truly proposed, and a "first draft" that the Board expects to refine and modify before the final rules are promulgated. To that end, Joint Commenters have proposed in Appendix A specific language changes to many sections of the current draft intended to work within the framework of this initial draft to ensure that the proposed rules enhance rail-to-rail competition and improvement in rail service as the industry continues to consolidate. These changes reflect the following points raised by Joint Commenters in response to the ANPR.

1. Merging Railroads Should be Required to Provide, Upon Request, Rates over "Bottleneck" Railroad Segments That are Created by the Merger and Pre-Existing Bottleneck Segments on the Merging Railroads

The Bottleneck Rules must be revised if rail competition for coal transportation is to improve as the industry continues to consolidate. The STB should promulgate regulations that

require merger applicants to provide rates and service terms upon request over all bottleneck segments of track in cases where (1) the merging railroad combines with a bottleneck railroad, thereby acquiring the full routing from an origin to a destination; and (2) there is an existing bottleneck on either of the merger applicants' systems where there is a current interchange between the merging carriers. Related changes to the Bottleneck Rules are discussed below.

a. The Board's use of the "one lump theory" to deny relief to shippers in the context of rail mergers is inconsistent with the Bottleneck Rules

The STB should use the NOPR as a means to resolve the inconsistency between the so-called "one lump theory" it has used to deny relief to captive shippers in the railroad merger context and the "contract exception" to the Bottleneck Rules. More specifically, both the BN/Santa Fe merger and the UP/SP merger resulted in the merged railroad obtaining a monopoly over a bottleneck segment of track owned by a previously neutral carrier and the remainder of the movement from origin to destination. In these circumstances the Interstate Commerce Commission ("ICC") and the STB denied the requests of captive coal shipper for relief from the extension of the bottleneck carrier's monopoly. This denial was based on the theory that the level of the harm to the captive shipper after the merger was no greater than the harm existing prior to the merger, because there is only one "lump" of profit to be had on the overall movement, and the monopoly destination carrier would absorb the lion's share of that profit regardless of whether or not it merged with an upstream carrier.

However, in the Bottleneck Decisions, the Board explicitly found that, if a coal shipper is able to obtain a contract for the movement of its coal by a non-bottleneck carrier from a different mine origin than that served by the incumbent carrier, the Board will prescribe a maximum reasonable rate over just the bottleneck portion of the movement. This prescription effectively

prohibits the bottleneck carrier from, as the "one lump theory" assumes, "soaking up" all the profit remaining on the overall movement after the non-bottleneck carriers compete for that portion of the movement. Accordingly, if the STB were to continue to adhere to the "one lump" theory in rail mergers, to the extent a merger results in the railroad with the bottleneck serving the same origin as a potential competitor over the non-bottleneck segment, the "contract exception" would cease to be available to the captive shipper.[3] The "one lump" theory should be expressly abandoned.

b. The Board should strengthen the ability of coal shippers to achieve the intended benefits of the "contract exception" to the bottleneck rules by (i) eliminating the "same origin" restriction, and (ii) requiring merging carriers to provide separately challengeable rates over bottleneck segments even if no contract exists for the non-bottleneck segment.

In the Bottleneck Decisions, the STB determined that a railroad need not provide a rate over a bottleneck segment if the bottleneck railroad and the non-bottleneck railroad that wishes to contract with the shipper for service over the non-bottleneck segment serve the same origin. This "same origin" restriction discourages most shippers of coal from Western coal mines from even attempting to obtain a contract for service over non-bottleneck segments. The reason is simple: many key mines in the west, particularly mines in the Wyoming Powder River Basin, are served by both UP and BNSF, and thus the STB will not even entertain a request that a bottleneck rate be prescribed until a coal shipper successfully prosecutes a competitive access case at the STB. This "same origin" restriction should be eliminated.

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[3] In the Bottleneck Decisions the STB allowed that a captive shipper precluded from obtaining a rate via the "contract exception" because of the same origin restriction could still attempt to obtain such a rate by filing a competitive access case with the STB establishing a more efficient interchange. However, even though the STB expressly acknowledged the fact that the hurdles for prevailing in such a case under the Board's current rules are prohibitively high, it gave no specifics as to any different standards that would apply to a competitive access case arising in a bottleneck situation. Thus, no captive shipper has filed a competitive access case at the Board since the Bottleneck Rules were adopted.

Second, the fears of utilities and other entities that a two carrier system in the West would not result in vigorous competition for captive traffic under the bottleneck rules have proven to be justified. Neither UP nor BNSF have actively sought to enter into competitively-priced contracts for transportation of coal over non-bottleneck segments where the other railroad holds a monopoly over a bottleneck segment. The Board should reconsider its refusal in the Bottleneck Decisions to require railroads to provide rates over bottleneck segments of track even if no contract is present for transportation above or below the bottleneck. The absence of competitively priced contracts for non-bottleneck segments gives credence to the position of numerous shippers in the Bottleneck Proceedings that the pro-competitive goals of the "contract exception" will only be reached if the bottleneck carriers are required to provide the rate first.

2. The Rules Should Establish Remedies in the Event That Service Declines After a Rail Merger, and Provide for the Substitution of Rail Service by Another Railroad on More Lenient Grounds.

The Board has acknowledged that recent mergers have resulted in substantial reductions in rail service levels to shippers after the merger was approved by the STB. Particularly as a result of the severe problems of the UP in implementing its merger, coal shippers and electric utilities suffered losses and damages in the tens of millions of dollars. Some of the Joint Commenters and other electric utilities outlined their specific circumstances to the Board in testimony submitted in Ex Parte No. 582. In general, however, most coal-fired generating facilities can normally withstand not more than 30-45 days of deteriorated service before their coal inventories are depleted. Moreover, the Board must realize that, in the event of such deterioration, it is not enough for service levels to be restored to prior levels. Rather, service must be restored to a greater level to quickly build inventories back up to levels that provide

adequate insurance that electric power will be supplied to wholesale and retail customers in the event of future rail service deterioration.

The Board's present merger policy and regulations permit a certain level of service deterioration after a merger before the STB will act, and the Board has to date afforded merging railroads a substantial degree of deference in their representations regarding their ability to return service levels to pre-merger levels. This policy unfairly places a large amount of the risk that merging railroads cannot effectively implement their merger on the shoulders of rail customers. The Board's policies and regulations must be changed to require more scrutiny of representations regarding service made by merger applicants, and less deference to merging railroads regarding rail service issues post-merger.

In proposed § 1180.10 the NOPR has adopted the concept of requiring merging railroads to submit as part of their application a "service assurance plan," the stated purpose of which is to "identify the precise steps to be taken by applicants to ensure that projected service levels are attainable and that key elements of the operating plan will improve service." Joint Commenters support the service assurance plan requirement. Other aspects of the NOPR require applicants to take certain steps and make certain representations regarding service. However, the NOPR does not contain any provisions which provide clear procedures and standards which could be utilized by rail shippers to seek compensation and other relief for post-merger service problems.

In an industry where only two major rail providers exist west of the Mississippi and the nation is rapidly moving toward only two rail providers in North America, the STB should have regulations that penalize the major rail carriers for <u>any</u> measurable reduction in service to shippers after a rail merger.

The NOPR should also include provisions setting forth procedures which an alternate carrier may be utilized and standards by a rail shipper in the event of severe deterioration by post-merger.

In summary, in order to advance a policy of improving rail service by enhancing competition and not tolerating any reductions in overall rail service as the industry continues to consolidate, the Board must amend its rules to (1) permit relief for any measurable reduction in rail service; (2) put the burden on the incumbent railroad, to rebut a presumption that alternative service will not interfere with its operations; and (3) impose penalties in the form of damages, including consequential damages, incurred as a result of the service deterioration.

3. Merging Railroads Should Be Required to Provide Reciprocal Switching and Trackage Rights from Terminal Points to Facilities Physically Connected to Only One Major Railroad

Another regulatory change that the STB should include in the NOPR is a presumption in rail merger cases in favor of reciprocal switching at a single rate in a terminal – and a reasonable distance beyond the terminal - for all connecting carriers. In setting the level of the rate, the Board should give substantial consideration of switching rate levels that enhance the competitive options available to shippers while covering the railroads' costs. Agreements between railroads regarding the level of the charge should be considered, but accepted by the Board only if the agreed-upon level enhances the feasible options of rail shippers after the merger.

4. The Viability and Independence of Short Line, Regional and Smaller Class I Carriers as Competitive Alternatives to Major Class I Railroads for Coal Transportation Should Be Ensured.

As the number of major railroads becomes fewer and their individual market power becomes more concentrated, it will be essential for the Board to ensure that smaller Class I and

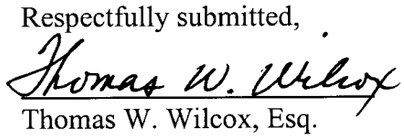
regional railroads are able to provide competitive alternatives to the major railroads for rail transportation at locations where such competition is operationally and economically feasible. The presence of such competitive alternatives will advance the policy of improving rail rates and service through competition. Some of the measures that should be included in the NOPR are regulations designed to (1) target and eliminate non-competitive "paper barriers" erected by major Class I railroads as part of the sale of a particular rail line as an outgrowth of a merger; (2) closely scrutinize the operating plans of merger applicants for evidence of intent to close interchanges and connections with short line railroads for anti-competitive reasons; and (3) facilitate the use of smaller Class I railroads and regional short lines as alternatives to incumbents in the event of service disruptions, even if such service is over the track of the incumbent railroad. In adopting and implementing such regulations, the STB must be cognizant of the market power major Class I railroads have over short line railroads.

IV.

CONCLUSION

In conclusion, Joint Commenters respectfully request the Board to incorporate the concepts and specific language included in these comments in the final rules issued in this proceeding.

Respectfully submitted,



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ATTACHMENT A

31369–

PART 1180--RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

1. The authority citation for part 1180 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323-11325.

2. Section 1180.0 is proposed to be revised to read as follows:

§ 1180.0 Scope and purpose.

The regulations in this subpart set out the information to be filed and the procedures to be followed in control, merger, acquisition, lease, trackage rights, and any other consolidation transaction involving more than one railroad that is initiated under 49 U.S.C. 11323. Section 1180.2 separates these transactions into four types: Major, significant, minor, and exempt. The informational requirements for these types of transactions differ. Before an application is filed, the designation of type of transaction may be clarified or certain of the information required may be waived upon petition to the Board. This procedure is explained in § 1180.4. The required contents of an application are set out in §§ 1180.6 (general information supporting the transaction), 1180.7 (competitive and market information), 1180.8 (operational information), 1180.9 (financial data), 1180.10 (service assurance plans), and 1180.11 (additional information needs for transnational mergers). A major application must contain the information required in §§ 1180.6(a), 1180.6(b), 1180.7(a), 1180.7(b), 1180.8(a), 1180.8(b), 1180.9, 1180.10, and 1180.11. A significant application must contain the information required in §§ 1180.6(a), 1180.6(c), 1180.7(a), 1180.7(c), and

1180.8(b). A minor application must contain the information required in §§ 1180.6(a) and 1180.8(c). Procedures (including time limits, filing requirements, participation requirements, and other matters) are contained in § 1180.4. All applications must comply with the Board's Rules of General Applicability, 49 CFR parts 1100 through 1129, unless otherwise specified. These regulations may be cited as the Railroad Consolidation Procedures.

3. Section 1180.1 is proposed to be revised to read as follows:

§ 1180.1 General policy statement for merger or control of at least two Class I railroads.

(a) General. To meet the needs of the public and the national defense, the Surface Transportation Board seeks to ensure balanced and sustainable competition in the railroad industry. The Board recognizes that the railroad industry (including Class II and III carriers) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports. The Board welcomes private sector initiatives that enhance the capabilities and the competitiveness of ~~this~~ the railroad industry and the broader transportation infrastructure. Although mergers of Class I railroads may advance our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board ~~does not favor~~ looks with disfavor upon ~~consolidations~~ mergers that ~~reduce~~ do not enhance the railroad and other transportation alternatives available to shippers ~~unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. Such public benefits include improved service, enhanced competition, and greater economic efficiency~~. The Board also will look with disfavor on consolidations under which the controlling entity does not assume full responsibility for carrying out

the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand.

(b) Consolidation criteria. The Board's consideration of the merger or control of at least two Class I railroads is governed by the public interest criteria prescribed in 49 U.S.C. 11324 and the rail transportation policy set forth in 49 U.S.C. 10101. In determining the public interest, the Board must consider the various goals of effective competition, carrier safety and efficiency, adequate service for shippers, environmental safeguards, and fair working conditions for employees. The Board must ensure that any approved transaction will promote a competitive, efficient, and reliable national rail system.

(c) Public interest considerations. The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits — such as improved service, enhanced rail-to-rail (intramodal) competition, enhanced competition in the broader transportation infrastructure, and greater economic efficiency — outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms. Although the Board cannot rule out the possibility that further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes additional consolidation in the industry, if not correctly conditioned, is also likely to result in a number of anticompetitive effects, such as loss of intramodal and geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations ~~could~~ are also likely to result in service disruptions during the system integration period absent appropriate measures taken during the application review process and beyond. To maintain a balance in favor of the public interest, rail merger applications must include specific provisions ~~for~~ that will enhance~~d~~ intramodal competition and competition in

the transportation infrastructure generally. Unless merger applications are so framed, approval of proposed combinations ~~where both carriers are financially sound~~ will likely cause the Board to make broad use of the powers available to it in 49 U.S.C. 11324(c) to condition its approval to preserve and enhance such competition. When evaluating the public interest, the Board will also consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public.

(1) ~~Potential~~ Public benefits. Mergers should generate important public benefits such as improved service, enhanced intramodal competition and competition in the broader transportation infrastructure and greater economic efficiency ~~By~~ by eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density.~~, mergers can generate important public benefits such as improved service, enhanced competition, and greater economic efficiency~~. ~~A m~~Mergers should also ~~can~~ strengthen a carrier's finances and operations. To the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies will be shared with shippers and consumers. Both the public and the consolidated carrier can benefit if the carrier is able to increase its marketing opportunities and provide better service. A merger transaction ~~can~~ should also improve existing competition ~~or~~ between railroads and provide new ~~competitive opportunities~~opportunities for competition in the railroad industry.~~, and~~ Merger applications that demonstrate that such enhanced intramodal competition will result from the merger will be given substantial weight in our analysis. Applicants shall make a good faith effort to calculate the net public benefits their merger will generate, and the Board will carefully evaluate such evidence. To ensure that applicants have

no incentive to exaggerate these projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner.

(2) Potential harm. The Board recognizes that consolidation can impose costs as well as benefits. It can reduce competition between railroads both directly and indirectly in particular markets, including product markets and geographic markets. Consolidation can also threaten essential services and the reliability of the rail network. In analyzing these impacts we must consider, but are not limited by, the policies embodied in the antitrust laws.

(i) Reduction of competition. Although in specific markets railroads operate in a highly competitive environment with vigorous intermodal competition from motor and water carriers, mergers can deprive rail shippers of effective options. Intramodal competition is reduced when two carriers serving the same origins and destinations merge. Competition in product and geographic markets can also be eliminated or reduced by end-to-end mergers. Any railroad combination entails a risk that the merged carrier will acquire and exploit increased market power. In addition to complying with subparagraph (d) of this section ~~A,~~ applicants shall propose remedies to mitigate and offset competitive harms resulting from their proposed merger. Such remedies shall, ~~Applicants shall also explain how they would~~ at a minimum, preserve competitive options such as those involving the use of major existing gateways, potential rail build-outs or build-ins, and the opportunity to enter into contracts for one segment of a rail movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Harm to essential services. The Board must ensure that essential freight, passenger, and commuter rail services are preserved. An existing service is essential if there is sufficient public

need for the service and adequate alternative transportation is not available. The Board's focus is on the ability of the nation's transportation infrastructure to continue to provide and support essential services. Mergers should strengthen and improve, ~~not undermine,~~ the ability of the rail network to advance the nation's economic growth and competitiveness, both domestically and internationally. The Board will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services.

(iii) Transitional service problems. Experience shows that significant service problems can arise during the transitional period when merging firms integrate their operations, even after applicants take extraordinary steps to avoid such disruptions. Because service disruptions harm the public, the Board, in its determination of the public interest, will ~~weigh~~ closely examine a merger application for the purpose of determining the likelihood of transitional service problems occurring after the merger is consummated. ~~.~~ In addition, under paragraph (i~~h~~) of this section, the Board will require applicants to provide a detailed service assurance plan as part of their application. Applicants also should explain how they will cooperate with other carriers in overcoming natural disasters or other serious service problems during the transitional period and afterwards.

~~(iv)~~ (d) Enhanced competition Consistent with subparagraph (c), applicants shall provide a detailed explanation of how the transaction and any conditions they propose will improve existing competition between railroads and provide new opportunities for competition in the railroad industry, and otherwise enhance competition in the broader transportation infrastructure. Means by which this policy goal shall be met shall include, but not be limited to, the following:

(i) the merged carrier shall provide common carrier rates and service terms upon request over all track segments of their combined system where (a) the merger results in a joint line movement between the applicants prior to the merger becoming a single line routing from origin to destination of the merged railroad, and (b) there is an existing interchange between the applicants prior to the merger;

(ii) the merged carrier shall provide rates and service terms over track segments in accordance with subparagraph (i) regardless of whether the merged railroad and another railroad serve the origin utilized by the shipper, and regardless of whether the shipper has obtained a contract for transportation services by another railroad over segments of track making up a joint line movement with the merged railroad;

(iii) the merged carrier shall establish reciprocal switching services at a single rate within an established terminal and a reasonable distance beyond the terminal, for all railroads with connections to the terminal prior to the merger and railroads who later establish such connections. In determining the appropriateness of the rate proposed by applicants for such services the Board shall give substantial consideration to rate levels that enhance the competitive options of rail shippers while also covering the merged railroad's costs of service;

(iv) applicants shall identify and produce as part of their application all agreements between applicants and short line railroads associated with the sale of any rail line as an outgrowth of the proposed merger, and shall provide a detailed explanation of any plans to close interchanges and connections with short line and regional railroads as part of the merger operating plan. The Board will eliminate any such agreements or plans that would prevent opportunities for new railroad competition from being created.

~~Enhanced competition. To offset harms that would not otherwise be mitigated, applicants shall explain how the transaction and conditions they propose will enhance competition.~~

(~~c~~d) Conditions. The Board has broad authority under 49 U.S.C. 11324(c) to impose conditions on consolidations, including divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. The Board will condition the approval of Class I combinations to mitigate or offset harm to the public interest~~, and~~ and to enhance intramodal competition and competition in the broader transportation infrastructure. The Board will carefully consider conditions proposed by applicants in this regard. The Board will impose conditions that are operationally feasible and produce net public benefits so as not to undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier. Conditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition. In this regard, the Board expects that any merger of Class I carriers will

create some anticompetitive effects that are difficult to mitigate through appropriate conditions, and that transitional service disruptions may temporarily negate any shipper benefits. Therefore, to offset these harms, applicants will be required to propose conditions that will ~~not simply preserve but also enhance competition~~preserve pre-merger intramodal competition to the maximum extent possible, but which will also improve and enhance intramodal competition and competition in the transportation infrastructure generally after the merger. The Board seeks to enhance competition in ways that strengthen, improve, and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).

(f~~e~~) Labor protection. The Board is required to provide adequate protection to the rail employees of applicants who are affected by a consolidation. The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. Otherwise, the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction. The Board will review negotiated agreements to assure fair and equitable treatment of all affected employees. Absent a negotiated agreement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement.

(g~~f~~) Environment and safety. (1) We encourage negotiated agreements between railroad-applicants and affected communities, including groups of neighborhood communities and other entities such as state and local agencies. Agreements of this nature can be extremely helpful and

effective in addressing local and regional environmental and safety concerns, including the sharing of costs associated with mitigating merger-related environmental impacts.

(2) Applicants will be required to work with the Federal Railroad Administration, on a case-by-case basis, to formulate Safety Integration Plans to ensure that safe operations are maintained throughout the merger implementation process. Applicants will also be required to submit evidence about potentially blocked grade crossings as a result of merger-related traffic increases.

(hg) Oversight. As a condition to its approval of any major transaction, the Board will establish a formal oversight process. For at least the first (5) years following approval, applicants will be required to present evidence to the Board, on ~~no less than an annual~~a quarterly basis, ~~to show~~ sufficient to demonstrate that the merger conditions imposed by the Board are working as intended, that competition between railroads and in the broader transportation infrastructure is being enhanced, that the applicants are adhering to the various representations they made on the record during the course of their merger proceeding, that no unforeseen harms have arisen that would require the Board to alter existing merger conditions or impose new ones, and that the merger benefit projections accepted by the Board are being realized in a timely fashion. Parties will be given the opportunity to comment on applicants' submissions, and applicants will be given the opportunity to reply to the parties' comments. During the oversight period, the Board will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction.

(i~~h~~) Service assurance and operational monitoring. (1) Good service is of vital importance to shippers. Accordingly, applicants must file, with the initial application and operating plan, a detailed service assurance plan, identifying the precise steps to be taken to ensure continuation of

adequate service and to provide for improved service. This plan must include the specific information set forth at § 1180.10 on how shippers and connecting railroads (including Class II and III carriers) across the new system will be affected and benefitted by the proposed consolidation. As part of this plan, the Board will require applicants to establish contingency plans that would be available to address the negative impacts if projected service levels do not materialize in a timely fashion.

(2) The Board will conduct extensive post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate and have not declined from pre-merger levels.

(3) ~~We will require a~~Applicants ~~to~~ shall ~~establish~~ also file with the initial application and operating plan, a detailed plan for resolving service-related problems and damage claims. This plan shall include the establishment of problem resolution teams and specific procedures for ~~problem~~ informal and formal dispute resolution to ensure that post-merger service problems, related claims issues, and other matters are promptly addressed. Also, ~~we would envision the establishment of~~ a Service Council made up of shippers, railroads, and other interested parties to provide an ongoing forum for the discussion of implementation issues shall be established.

(~~ii~~) Cumulative impacts and crossover effects. Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components, the Board cannot evaluate the merits of a major transaction in isolation — the Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to anticipate with as much certainty as possible what additional Class I merger applications are likely to be filed in response to their own

application and explain how these applications, taken together, could affect the eventual structure of the industry and the public interest. When calculating the likely public benefits that their merger will generate, applicants are to measure these benefits in light of the anticipated downstream mergers. Applicants will be expected to discuss in detail whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, following approval by us of any future consolidation(s).

(k~~j~~) Inclusion of other carriers. The Board will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.

(l~~k~~) Transnational issues. (1) Future merger applications may present novel and significant transnational issues. In cases involving major Canadian and Mexican railroads, applicants must submit "full system" competitive analyses and operating plans — incorporating their operations in Canada or Mexico — from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States. With respect to rail safety in the United States, applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the national origins of merger applicants. When an application would result in foreign control of a Class I railroad, applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network, and applicants must address how any ownership restrictions imposed by foreign governments should affect our public interest assessment.

(2) The Board will consult with relevant officials as appropriate to ensure that any conditions it imposes on a transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination.

(m~~l~~) National defense. Rail mergers must not detract from the ability of the United States military to rely on rail transportation to meet the nation's defense needs. Applicants must discuss and assess the national defense ramifications of their proposed merger.

(n~~m~~) Public participation. To ensure a fully developed record on the effects of a proposed railroad consolidation, the Board encourages public participation from federal, state, and local government departments and agencies; affected shippers, carriers, and rail labor; and other interested parties.

§ 1180.3 Definitions.

(a) Applicant. The term applicant means the parties initiating a transaction, but does not include a wholly owned direct or indirect subsidiary of an applicant if that subsidiary is not a rail carrier. Parties who are considered applicants, but for whom the information normally required of an applicant need not be submitted, are:

(1) in minor trackage rights applications, the transferor and

(2) in responsive applications, a primary applicant.

(b) Applicant carriers. The term applicant carriers means: any applicant that is a rail carrier; any rail carrier operating in the United States, Canada, and/or Mexico in which an applicant holds a controlling interest; and all other rail carriers involved in the transaction. This does not include carriers who are involved only by virtue of an existing trackage rights agreement with applicants.

* * * * *

§ 1180.4 Procedures.

(a) * * * (1) The original and 25 copies of all documents shall be filed in major proceedings. The original and 10 copies shall be filed in significant and minor proceedings.

* * *

(4) [Removed]

(b) * * *

(4) When filing the notice of intent required by paragraph (b)(1) of this section, applicants also must file:

(i) A proposed procedural schedule. In any proceeding involving either a major transaction or a significant transaction, the Board will publish a FEDERAL REGISTER notice soliciting comments on the proposed procedural schedule, and will, after review of any comments filed in response, issue a procedural schedule governing the course of the proceeding.

(ii) A proposed draft protective order. The Board will issue, in each proceeding in which such an order is requested, an appropriate protective order.

(iii) A statement of waybill availability for major transactions. Applicants must indicate, as soon as practicable after the issuance of a protective order, that they will make their 100% traffic tapes available (subject to the terms of the protective order) to any interested party on written request. The applicants may require that, if the requesting party is itself a railroad, applicants will make their 100% traffic tapes available to that party only if it agrees, in its written request, to make its own 100% traffic tapes available to applicants (subject to the terms of the protective order) when it receives access to applicants' tapes.

(iv) A proposed voting trust. In each proceeding involving a major transaction, applicants contemplating the use of a voting trust must inform the Board as to how the trust would insulate them from an unlawful control violation and as to why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. Following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust.

(c) * * *

(6) * * *

(vi) The information and data required of any applicant may be consolidated with the information and data required of the affiliated applicant carriers.

(d) Responsive applications. (1) No responsive applications shall be permitted to minor transactions.

(2) An inconsistent application will be classified as a major, significant, or minor transaction as provided for in § 1180.2(a) through (c). The fee for an inconsistent application will be the fee for the type of transaction involved. See 49 CFR 1002.2(f)(38) through (41). The fee for any other type of responsive application is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(3) Each responsive application filed and accepted for consideration will automatically be consolidated with the primary application for consideration.

(e) * * *

(2) The evidentiary proceeding will be completed:

(i) Within 1 year (after the primary application is accepted) for a major transaction;

(ii) Within 180 days for a significant transaction; and

(iii) Within 105 days for a minor transaction.

(3) A final decision on the primary application and on all consolidated cases will be issued:

(i) Within 90 days (after the conclusion of the evidentiary proceeding) for a major transaction;

(ii) Within 90 days for a significant transaction; and

(iii) Within 45 days for a minor transaction.

* * *

(f) * * *

(2) Except as otherwise provided in the procedural schedule adopted by the Board in any particular proceeding, petitions for waiver or clarification must be filed at least 45 days before the application is filed.

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§ 1180.6 Supporting information.

* * * * *

(b) * * *

(1) Form 10-K (exhibit 6). Submit: the most recent filing with the Securities and Exchange Commission (SEC) under 17 CFR 249.310 if made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form 10-K subsequently filed with the SEC over the duration of the proceeding.

(2) Form S-4 (exhibit 7). Submit: the most recent filing with the SEC under 17 CFR 239.25 if made within the year prior to the filing of the application by each applicant or by any entity that

is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form S-4 subsequently filed with the SEC over the duration of the proceeding.

(3) Change in control (exhibit 8). If an applicant carrier submits an annual report Form R-1, indicate any change in ownership or control of that applicant carrier not indicated in its most recent Form R-1, and provide a list of the principal six officers of that applicant carrier and of any related applicant, and also of their majority-owned rail carrier subsidiaries. If any applicant carrier does not submit an annual report Form R-1, list all officers of that applicant carrier, and identify the person(s) or entity/entities in control of that applicant carrier and all owners of 10% or more of the equity of that applicant carrier.

(4) Annual reports (exhibit 9). Submit: the two most recent annual reports to stockholders by each applicant, or by any entity that is in control of an applicant, made within 2 years of the date of filing of the application. These shall not be incorporated by reference, and shall be updated with any annual or quarterly report to stockholders issued over the duration of the proceeding.

* * *

(6) Corporate chart (exhibit 11). Submit a corporate chart indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity (with each chart indicating the percentage ownership of every company on the chart by any other company on the chart). For each company: include a statement indicating whether that company is a noncarrier or a carrier; and identify every officer and/or director of that company who is also an officer and/or director of any other company

that is part of a different corporate family, which includes a rail carrier. Such information may be referenced through notes to the chart.

* * *

(8) Intercorporate or financial relationships. Indicate whether there are any direct or indirect intercorporate or financial relationships at the time the application is filed, not disclosed elsewhere in the application, through holding companies, ownership of securities, or otherwise, in which applicants or their affiliates own or control more than 5% of the stock of a non-affiliated carrier, including those relationships in which a group affiliated with applicants owns more than 5% of the stock of such a carrier. Indicate the nature and extent of such relationships, if they exist, and, if an applicant owns securities of a carrier subject to 49 U.S.C. Subtitle IV, provide the carrier's name, a description of securities, the par value of each class of securities held, and the applicant's percentage of total ownership. For purposes of this paragraph (b)(8), "affiliates" has the same meaning as "affiliated companies" in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).

(9) Employee impact exhibit. The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impacts will occur, the time frame of the impacts (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. This information (except with respect to employee protection agreements) may be set forth in the following format:

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES

Current Location	Classification	Jobs Transferred to	Jobs Abolished	Jobs Created	Year

(10) Conditions to mitigate and offset merger harms and to enhance competition. Applicants are expected to propose measures to mitigate and offset merger harms. ~~These conditions should not simply preserve, but also enhance, competition.~~. Applicants must also propose conditions or other measures consistent with §1180.1(d) that enhance intramodal competition and competition in the broader transportation infrastructure after the merger is consummated.

(i) Applicants must explain how they will preserve competitive options for shippers and for Class II and III rail carriers. At a minimum, applicants must explain how they will preserve the use of major gateways, the potential for build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Applicants must explain in detail how the transaction and conditions they propose will enhance intramodal competition, and competition in the broader transportation infrastructure, and will improve rail service.

(11) Calculating public benefits. Applicants must enumerate and, where possible, quantify the net public benefits their merger will generate (if approved). In making this estimate, applicants should identify the benefits arising from service improvements, enhanced intramodal competition and competition in the broader transportation infrastructure, cost savings, and other merger-related

public interest benefits. Applicants must also identify, discuss, and, where possible, quantify the likely negative effects approval will entail, such as losses of competition, potential for service disruption, and other merger-related harms. In addition, applicants must suggest additional measures that the Board might take if the anticipated public benefits identified by applicants fail to materialize in a timely manner.

(12) Downstream merger applications. (i) Applicants should anticipate what additional Class I merger applications are likely to be filed in response to their own application and explain how, taken together, these applications could affect the eventual structure of the industry and the public interest.

(ii) Applicants are expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should the Board approve additional future rail mergers.

(iii) In calculating the public benefits arising from their merger, applicants should measure them in light of the anticipated downstream merger applications.

(13) Purpose of the proposed transaction. The purpose sought to be accomplished by the proposed transaction, e.g., improving service, enhancing intramodal competition and competition in the broader transportation infrastructure, strengthening the nation's transportation infrastructure, creating operating economies, and ensuring financial viability.

* * * * *

§ 1180.7 Market analyses.

(a) For major and significant transactions, applicants shall submit impact analyses (exhibit 12) that describe the impacts of the proposed transaction — both adverse and beneficial — on inter- and intramodal competition with respect to freight surface transportation in the regions affected by the transaction and on the provision of essential services by applicants and other carriers. An impact analysis should include underlying data, a study on the implications of those data, and a description of the resulting likely effects of the transaction on transportation alternatives available to the shipping public. Each aspect of the analysis should specifically address significant impacts as they relate to the applicable statutory criteria (49 U.S.C. 11324(b) or (d)), essential services, and competition. Applicants must identify and address relevant markets and issues, and provide additional information as requested by the Board on markets and issues that warrant further study. Applicants (and any other party submitting analyses) must demonstrate both the relevance of the markets and issues analyzed and the validity of the methodology. All underlying assumptions must be clearly stated. Analyses should reflect the consolidated company's marketing plan and existing and potential competitive alternatives (inter- as well as intramodal). They can address: city pairs, interregional movements, movements through a point, or other factors; a particular commodity, group of commodities, or other commodity factor that will be significantly affected by the transaction; or other effects of the transaction (such as on a particular type of service offered).

(b) For major transactions, applicants shall submit "full system" impact analyses (incorporating any operations in Canada or Mexico) from which they must demonstrate the impacts of the transaction — both adverse and beneficial — on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product

competition, and geographic competition) and the provision of essential services (including freight, passenger, and commuter) by applicants and other network links (including Class II and Class III rail carriers and ports). Applicants' impact analyses must at least provide the following types of information:

(1) The anticipated effects of the transaction on traffic patterns, market concentrations, and/or transportation alternatives available to the shipping public. Consistent with § 1180.6(b)(10), these must incorporate a detailed examination of the ways in which the transaction would enhance rail-to-rail competition and competition in the broader transportation infrastructure and of the specific measures proposed by applicants to preserve and improve existing levels of competition and essential services;

(2) Actual and projected market shares of originated and terminated traffic by railroad for each major point on the combined system before and after the proposed transaction. Applicants may define points as individual stations or as larger areas (such as Bureau of Economic Analysis statistical areas or U.S. Department of Agriculture Crop Reporting Districts) as relevant and indicate the extent of switching access and availability of terminal belt railroads. Applicants should list points where the number of serving railroads would drop from two to one and from three to two, respectively, as a result of the proposed transaction (both before and after applying proposed remedies for competitive harm);

(3) Actual and projected market shares of revenues and traffic volumes before and after the proposed transaction for major interregional or corridor flows by major commodity group. Origin/destination areas should be defined at relevant levels of aggregation for the commodity group

in question. The data should be broken down by mode and (for the railroad portion) by single-line and interline routings (showing gateways used). Applicants should explain relevant differences in the effectiveness of competing routings (with respect, e.g., to transit time, terrain, track conditions, and capacity);

(4) For each major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual and projected revenues and traffic volumes before and after the proposed transaction;

(5) Maps and other graphic displays where helpful in illustrating the analyses in this section;

(6) An explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services; and

(7) Supporting data for the analyses in this section, such as the basis for projections of changes in traffic patterns, including shipper surveys and econometric or other statistical analyses. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

(c) For significant transactions, specific regulations on impact analyses are not provided so that the parties will have the greatest leeway to develop the best evidence on the impacts of each individual transaction. As a general guideline, applicants shall provide supporting data that may (but need not) include: current and projected traffic flows; data underlying sales forecasts or marketing

goals; interchange data; market share analysis; and/or shipper surveys. It is important to note that these types of studies are neither limiting nor all inclusive. The parties must provide supporting data, but are free to choose the type(s) and format. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

§ 1180.8 Operational data.

(a) For major transactions applicants must submit a "full system" operating plan – incorporating any prospective operations in Canada and Mexico – from which they must demonstrate how the proposed transaction will affect operations within regions of the United States and this nation as a whole.

(1) Safety integration plan. Applicants must submit a safety integration plan.

(2) Blocked crossings. Applicants must indicate what measures they plan to take to address potentially blocked grade crossings as a result of merger-related changes in operations or increases in rail traffic.

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§ 1180.10 Service assurance plans.

For major transactions: service assurance plan. Applicants shall submit a service assurance

plan, which, in concert with the operating plan requirements, will identify the precise steps ~~to be taken by~~ applicants will take to ensure that projected service levels are attainable and that ~~key elements of~~ the operating plan will improve service. The plan shall describe with reasonable precision how operating plan efficiencies will translate into present and future benefits for the shipping public. The plan must also describe any potential area of service degradation that might result due to operational changes. The plan must encompass:

(a) Integration of operations. Based on the operating plan, and using benchmarks for the year immediately preceding the filing date of the application, applicants must (i) describe how the transaction will result in improved service levels and (ii) must identify potential instances where service may be degraded. While precise in nature, this description is expected to be a route level review rather than a shipper-by-shipper review. Nonetheless, the plan ~~should~~ shall be sufficiently ~~for~~ detailed to enable individual shippers to evaluate the projected improvements and respond to the potential areas of service degradation for their customary traffic routings. The plan should inform Class II and III railroads and other connecting railroads of the operational changes that may have an impact on their operations, including operations involving major gateways.

(b) Coordination of freight and passenger operations. If Amtrak or commuter services are operated over the lines of the applicant carriers, applicants must describe definitively how they will continue to operate these lines to fulfill existing performance agreements for those services. Whether or not the passenger services operated are over lines of the applicants, applicants must establish operating protocols that ensure effective communications with Amtrak and/or regional rail passenger operators in order to minimize any potential transaction-related negative impacts.

(c) Yard and terminal operations. The operational fluidity of yards and terminals is key to the successful implementation of a transaction and effective service to shippers. Applicants must describe how the operations of principal classification yards and major terminals will be changed or revised and how these revisions will affect service to customers. As part of this analysis, applicants must furnish dwell time information for one year prior to the transaction for each facility described above, and estimate what the expected dwell time will be after the revised operations are implemented. Also required will be a discussion of on-time performance for the principal yards and terminals in the same terms as required for dwell time.

(d) Infrastructure improvements. Applicants must identify potential infrastructure impediments (using volume/capacity line and terminal forecasts), formulate solutions to those impediments, and develop timeframes for resolution. Applicants must also develop a capital improvement plan (to support the operating plan) for timely funding and completing the improvements critical to transition of operations. They should also describe improvements related to future growth, and indicate the relationship of the improvements to service delivery.

(e) Information technology systems. Because the accurate and timely integration of applicants' information systems are vitally important to service delivery, applicants must identify the process to be used for systems integration and training of involved personnel. This must include identification of the principal operations-related systems, operating areas affected, implementation schedules, the real-time operations data used to test the systems, and pre-implementation training requirements needed to achieve completion dates. If such systems will not be integrated and on line prior to implementation of the transaction, applicants must describe the interim systems to be used and how those systems will assure service delivery.

(f) Customer service. To achieve and maintain customer confidence in the transaction and to ensure the successful integration and consolidation of existing customer service functions, applicants must identify their plans for the staffing and training of personnel within or supporting the customer service centers. This discussion must include specific information on the planned steps to familiarize customers with any new processes and procedures that they may encounter in using the consolidated systems and/or changes in contact locations or telephone numbers.

(g) Labor. Applicants must furnish a plan for reaching necessary labor implementing agreements. Applicants must also provide evidence that sufficient qualified employees to effect implementation will be available at the proper locations prior to the transaction.

(h) Training. Applicants must establish a plan to provide necessary training to employees involved with operations, train and engine service, operating rules, dispatching, payroll and timekeeping, field data entry, safety and hazardous material compliance, and contractor support functions (i.e., crew van service), as well as to other employees in functions that will be affected by the transaction.

(i) Contingency plans for merger-related service disruptions. In order to address potential disruptions of service that may occur, applicants must establish contingency plans. Those plans, based upon available resources and traffic flows and density, must identify potential areas of disruption and the risk of occurrence. Applicants must provide evidence that contingency plans are in place to minimize negative service impacts and promptly restore service.

(j) Timetable. Applicants must identify all major functional or system changes/consolidations that will occur and the time line for successful completion.

§ 1180.11 Additional information needs for transnational mergers.

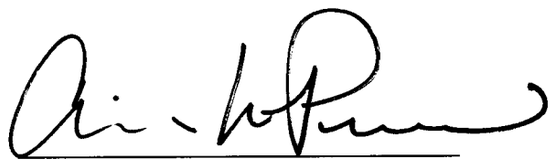
(a) Applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the national origins of merger applicants.

(b) Applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations, and be detrimental to the interests of the United States, and discuss any ownership restrictions imposed on them by foreign governments.

(c) Applicants must discuss and assess the national defense ramifications of the proposed merger.

CERTIFICATE OF SERVICE

I hereby certify that I have served on this 17th day of November, 2000 a copy of the above JOINT COMMENTS OF CERTAIN COAL SHIPPERS by first class mail postage pre-paid, to all parties of record.



Aimee DePew